

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

SEP 12 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

)	2 CA-JV 2008-0060
)	DEPARTMENT A
)	
IN RE AUSTIN M.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
)	Rule 28, Rules of Civil
)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16723002

Honorable Theodore J. Knuck, Judge Pro Tempore

AFFIRMED

Barbara LaWall, Pima County Attorney
By Dale Cardy

Tucson
Attorneys for State

Robert J. Hirsh, Pima County Public Defender
By Eva K. Bacal

Tucson
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B R A M M E R, Judge.

¶1 Austin M., a minor, appeals from the juvenile court's denial of his motion to suppress evidence at his delinquency adjudication hearing. He also challenges the court's

disposition order committing him to the Arizona Department of Juvenile Corrections (ADJC). We affirm.

¶2 In reviewing a ruling on a motion to suppress, “[w]e review only the evidence presented at the suppression hearing, and we view it in the light most favorable to upholding the juvenile court’s factual findings.” *In re Ilono H.*, 210 Ariz. 473, ¶ 2, 113 P.3d 696, 697 (App. 2005) (citation omitted). In this case, the evidence presented at the suppression hearing was co-extensive with that presented for adjudication. The following evidence is undisputed.

¶3 A store clerk recognized Austin from a picture on a flyer posted in the store window that stated a warrant existed for Austin’s arrest. The clerk called the sheriff’s department, and deputies responded. They looked at the flyer and then approached Austin outside the store. One of the deputies recognized Austin “from a prior contact.” Austin told the deputies “he had run away from home shortly after the last contact he had [had] with that deputy . . . and that he had not made contact with his probation officer anytime recently.” The deputies attempted at the scene to verify the existence of a warrant but were unable to do so. After transporting Austin to the juvenile detention center, they learned that a warrant for Austin’s arrest had been prepared, but it had not yet been signed by a judge. The warrant was apparently signed later that day.

¶4 In preparation for transporting Austin, deputies placed him in handcuffs and searched him. Before doing so, however, and without advising him of his rights pursuant to

Miranda v. Arizona, 384 U.S. 436 (1966), one of the deputies asked Austin “if he had anything on him that would hurt [her] or that [she] needed to be aware of.” Austin responded that he had a “crystal meth pipe” in his pocket, and another deputy retrieved the pipe. A delinquency petition was eventually filed alleging a single count of possession of drug paraphernalia.

¶5 In the motion to suppress, Austin challenged the admissibility of his statement and the pipe, arguing that the statement was obtained in violation of *Miranda* and that the pipe was inadmissible as “fruit of the poisonous tree” under *Wong Sun v. United States*, 371 U.S. 471 (1963).¹ The state conceded in its response that Austin was in custody when the deputy asked the question. It argued, however, that *Miranda* was “not violated” because the deputy’s question was “motivated by safety concerns” and that the pipe was also admissible under the inevitable-discovery doctrine. The deputy testified that she asked

¹On appeal, Austin also appears to challenge the legality of his detention and search based on “the defective warrant.” In his opening brief, he asserts that “deputies should have confirmed the existence of a warrant before searching [him]” and should have “concluded [the warrant] was not valid” when they were unable to do so. In his reply brief, he argues: “Although the sheriff’s deputies may have had initial cause to detain [him], once they knew or should have discovered that there was no valid warrant, the detention was no longer justified” and “there was no cause to further detain [him].” But Austin did not raise these issues below; therefore, we need not address them here. *See In re Kyle M.*, 200 Ariz. 447, ¶ 25, 27 P.3d 804, 809 (App. 2001). And we note that, when the deputies approached Austin, he told them that he had run away from home. Therefore, they had probable cause to believe Austin had committed at least an incorrigibility offense. *See* A.R.S. § 8-201(15)(c) (incorrigible child includes a child who “[i]s a runaway from the child’s home or parent, guardian or custodian”); A.R.S. § 8-303(C)(1) (peace officer may take juvenile into temporary custody “without a warrant, if there are reasonable grounds to believe that the juvenile has committed a delinquent act or the child is incorrigible”).

Austin the question just before placing him in handcuffs and that her “intent was for officer safety purposes; to make sure that when I did search him that I wasn’t going to poke myself with anything.” The juvenile court denied the motion, stating: “I believe that the officers both testified clearly that their question was one question regarding officer safety, and I do not believe that this constituted an interrogation.”² We review the court’s ruling “only for clear and manifest error . . . [as] to questions of fact; the applicable standard of review on questions of law is ‘de novo.’” *In re Maricopa County Juv. Action No. JT30243*, 186 Ariz. 213, 216, 920 P.2d 779, 782 (App. 1996) (citations omitted).

¶6 Under *Miranda*, the term “interrogation” includes “express questioning” and “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). “The focus in ascertaining whether particular police conduct amounts to interrogation . . . is not on the form of the words used, but the intent of the police officers and the perceptions of the suspect.” *State v. Finehout*, 136 Ariz. 226, 230, 665 P.2d 570, 574 (1983). Here, the juvenile court found that the deputy’s question was prompted by concern for her own safety. Nothing in the circumstances of the detention suggests the deputy intended or should have known her question was likely to elicit an incriminating response. Rather, she testified that she had

²Another deputy present at the scene testified: “I like to ask that question, because it lets me know if there’s anything dangerous on that person that I might . . . hurt myself on.”

been trained to ask that question, suggesting she asked it as a matter of routine prior to a search. *See State v. Cunningham*, 40 P.3d 535, 539 (Or. Ct. App. 2002) (question whether suspect had “anything that was sharp or would hurt” officer performing pat-down search was question “normally attendant to arrest” and thus excepted from definition of interrogation). But assuming that the question constituted interrogation, Austin’s answer was admissible. “Voluntary responses to ‘questions necessary to secure [the officer’s] own safety or the safety of the public’ may be admitted in court despite the lack of *Miranda* warnings.” *In re Roy L.*, 197 Ariz. 441, 446, 4 P.3d 984, 989 (App. 2000), *quoting New York v. Quarles*, 467 U.S. 649, 659 (1984) (alteration in *Roy L.*); *see also People v. Cressy*, 55 Cal. Rptr. 2d 237, 239-41 (1996) (narrow inquiry designed to ensure officer safety during search permissible without *Miranda* warnings under public-safety exception to exclusionary rule).

¶7 Even assuming further, however, that the deputy’s question constituted interrogation and did not fall within the public-safety exception to the *Miranda* requirement, any error in the juvenile court’s failure to suppress Austin’s answer was harmless because the court properly admitted the pipe itself as evidence. *See State v. Devaney*, 18 Ariz. App. 98, 100, 500 P.2d 629, 631 (1972) (“The admission into evidence of a defendant’s statements obtained in violation of *Miranda* can be harmless beyond a reasonable doubt.”). Austin’s only argument below for the suppression of the pipe was that “deputies [had] searched [him] after he made an unwarned admission.” Nothing in the record suggests that deputies searched him because of the admission. Nonetheless, Austin did not contend his

statement was involuntary. Thus the exclusionary rule announced in *Wong Sun* did not apply, see *United States v. Patane*, 542 U.S. 630, 636-37 (2004), and the court properly admitted the pipe.

¶8 Next, we review the juvenile court’s disposition order for an abuse of discretion. See *In re Miguel R.*, 204 Ariz. 328, ¶ 3, 63 P.3d 1065, 1068 (App. 2003). Austin argues that the court abused its discretion by committing him to ADJC based on its finding that he was a danger to himself and without “adequately considering the commitment guidelines.” “The juvenile court has broad discretion to determine an appropriate disposition for a delinquent juvenile.” *In re Niky R.*, 203 Ariz. 387, ¶ 10, 55 P.3d 81, 84 (App. 2002). In the analogous context of adult sentencing, an abuse of discretion occurs if the court acts arbitrarily or capriciously or fails to conduct an adequate investigation into the facts relevant to sentencing. See *State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110, 1125 (1985). In a delinquency case, a court may also abuse its discretion by failing to consider the advisory guidelines established by the Arizona Supreme Court for the commitment of minors to ADJC. See *In re Melissa K.*, 197 Ariz. 491, ¶ 14, 4 P.3d 1034, 1038 (App. 2000). But that did not happen here.

¶9 At the disposition hearing, the juvenile court reviewed Austin’s unsuccessful history of probation and drug treatment. He had been on probation supervision for approximately two years but had repeatedly absconded and cut off his electronic monitor. He had also run away from residential drug treatment and was on intensive probation at the

time of this offense. The probation officer stated he had “tried everything with Austin” but “probation [was] making minimal impact on [him] at this point.” The court also noted that Austin had “been adjudicated as a repeat felony juvenile offender” and that, if he were arrested for a subsequent felony offense, he would be “tried as an adult in the criminal division.” The court thus seemed more concerned with Austin’s danger to himself than the danger he poses to the community. The prosecutor stated that Austin had a history of “some incidents of stealing, some shoplifting,” but was not “really a severe threat to the community”; rather, the “bigger concern with [Austin] . . . is the threat he [poses] to himself with his substance abuse.”

¶10 The court clearly weighed the threat Austin posed to himself and the community and the severity of Austin’s crimes against the feasibility of a less restrictive alternative and concluded that Austin “met the criteria of the guidelines for commitment.” We cannot say it abused its discretion in doing so. The juvenile court’s disposition order is affirmed.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge